IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

THOMAS EMIL SLIWINSKI, Plaintiff, vs. BRIAN GOOTKIN; PAUL REES; LT. BILTOFT; CONNIE WINNER; LEVI SHRIG; TANYA DEMPSTY; JOHN DOES 1–2, Defendants.	Cause No. CV 21-51-H-BMM-JTJ ORDER

Defendants have moved for summary judgment. (Doc. 50.) Plaintiff Thomas Emil Sliwinksi ("Sliwinski") objects. (Docs. 65.) For the following reasons, the Court will grant Defendants' Motion.

I. BACKGROUND

Sliwinski was previously at Montana State Prison ("MSP") and is now at the Montana Department of Corrections' Riverside Special Needs Unit ("RSNU"). The details of this case are quite familiar to the litigants, as this is the third lawsuit in the last few years related to this subject matter.

Briefly, Sliwinski suffered an injury to his abdomen in 2015 that has never completely healed, despite having had surgery. He continues to have an abdominal

fistula and a draining sinus. (Doc. 52 at ¶ 9.) In 2018, Sliwinksi filed two lawsuits against many of these same defendants, regarding what he considered to be violations of his Eighth Amendment rights. (Doc. 52 at 2–3); *see Sliwinski v. Salmonsen et al.*, CV 18-82-H-BMM-JTJ, and *Sliwinksi v. State*, 2020 MT 161N (affirming state district court). Judgment was entered against him in both lawsuits.

Sliwinski filed this lawsuit about a year after the Montana Supreme Court affirmed dismissal of his previous state action. (Doc. 52 at 3–4.) He alleges that the defendants have violated his Eighth Amendment rights by not adequately treating his abdominal wound, and he seeks money damages and an order directing the defendants to arrange for him to be seen by a specialist and to have surgery. (Doc. 21 at 10–11.)

II. ANALYSIS

Defendants seeks summary judgment for three reasons: (1) Sliwinski's action is barred by res judicata; (2) Defendants have not violated Sliwinski's Eighth Amendment rights; and (3) Defendants are entitled to qualified immunity. (Doc. 51 at 6–7.) The Court concludes that the second contention is dispositive: Defendants have not violated Sliwinksi's constitutional rights.

A. Standard for Summary Judgment

Federal Rule of Civil Procedure 56(a) entitles a party to summary judgment "if the movant shows that there is no genuine dispute as to any material fact and

the movant is entitled to judgment as a matter of law." The movant bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A material fact is one that might affect the outcome of the suit under governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Once the moving party has satisfied its burden, the non-moving party must go beyond the pleadings and designate by affidavits, depositions, answers to interrogatories, or admissions on file, "specific facts showing that there is a genuine issue for trial." *Id*. The Court views the evidence in the light most favorable to the nonmoving party and draws all justifiable inferences in the non-moving party's favor when deciding a motion for summary judgment. *Id*. at 255; *Betz v. Trainer Wortham & Co., Inc.*, 504 F.3d 1017, 1020–21 (9th Cir. 2007).

B. Medical Care

Lack of medical care in a prison context may give rise to an Eighth Amendment claim. A prisoner must allege that a defendant's "acts or omissions [were] sufficiently harmful to evidence a deliberate indifference to serious medical needs," to sufficiently state a §1983 claim for failure to provide medical care.

Estelle v. Gamble, 429 U.S. 97, 106 (1976); *Toussaint v. McCarthy*, 801 F.2d 1080, 1111 (9th Cir. 1986).

The Ninth Circuit employs a two-prong test for deliberate indifference to medical needs. A plaintiff first must show "a serious medical need by demonstrating that failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain." *Wilhelm v. Rotman*, 680 F.3d 1113, 1122 (9th Cir. 2012) (quoting *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006)). A plaintiff then must show "the defendant's response to the need was deliberately indifferent." *Id.*

Deliberate indifference is a "high legal standard," *Toguchi v. Chung*, 391 F.3d 1051, 1060 (9th Cir. 2004), and requires a showing of "a purposeful act or failure to respond to a prisoner's pain or possible medical need and . . . harm caused by the indifference." *Wilhelm*, 680 F.3d at 1122. Such indifference may manifest in two ways. "It may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown by the way in which prison physicians provide medical care." *Hutchinson v. United States*, 838 F.2d 390, 394 (9th Cir. 1988) (citing *Estelle*, 429 U.S. at 104–05). A showing of medical malpractice, negligence, or even gross negligence is insufficient to establish a constitutional violation of the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97,104–05 (1976). A difference of opinion is also insufficient, as a matter

of law, to establish deliberate indifference. *See Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996); *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989).

The parties do not dispute that Sliwinski has serious medical needs, including, in addition to his abdominal wound, dysphagia, diabetes mellitus, vascular disease, hypertension, edema, cellulitis of his hands and feet, and a cerebral vascular accident. (Doc. 52 at ¶¶ 27–29; Doc. 52-3 at ¶ 17.) The crux of this dispute is what level of care for those needs the Constitution demands.

The Affidavit of Defendant Dr. Paul Rees details Sliwinksi's medical care over the last few years. (Doc. 52-3); s*ee also* (Doc. 16-1) (Affidavit of Dr. Rees filed in support of Report to the Court, September 3, 2021.) The differences between these two reports, filed about fifteen months apart, are instructive, because during that time, Sliwinski continued to receive weekly wound care, seeing a doctor in Helena for over 75 weeks; he went to the emergency room more than once; and he saw several specialists related to whether he is currently a good candidate for abdominal surgery. (Doc. 52-3 at 3–9.) The portion of his medical record filed with the Court is extensive. (Docs. 52-3 and 63.)

Of ultimate importance here, however, is that several doctors have concluded that though he may benefit from the removal of an abdominal mesh that was inserted years ago, his current condition and comorbidities make the surgery inappropriate at this time. (Doc. 52 at ¶¶ 32, 49, 53, 55, and 62.) Sliwinski was

previously evaluated in 2018 by Dr. Daniel Vargo of the University of Utah who concluded that surgical intervention was not appropriate at this time and was "very complex, meaning that it carries with it a lot of risks." (Doc. 52 at ¶ 32.) Defendant Dr. Rees concurred with this assessment, though Sliwinski did not, and that disagreement formed the basis of Sliwinski's prior suit. (Doc. 52 at 7.) Dr. Rees focused on attempts to gain compliance on Sliwinski's comorbidities and monitoring for clinical deterioration. (Doc. 52 at 8.) Defendants conclude that Sliwinski has not taken the steps necessary to improve his comorbidities. (Docs. 51 at 20; 53 at 15, 17–18.)

Sliwinski has a much more dire impression of his health, and contends that "[a]ll physicians that say plaintiff['s] abdomen won't get worse or that plaintiff only needs to do wound care is living in fantasy land." (Doc. 65 at 3.) He refers to his weekly wound care appointments with Dr. John Galt, but appears to dismiss these appointments as irrelevant. (Doc. 65 at 3.) These weekly appointments have also served a monitoring function, however, as he has occasionally been sent by Dr. Galt to the emergency room for evaluation of other issues.

Sliwinksi visited the emergency room on June 26, 2021, related to abdominal bleeding, and at that time, the provider noted "Continue to persue [sic] surgical opportunities *as an outpatient* for difinitive [sic] management." (Doc. 52-3 (emphasis added).)

Sliwinksi saw Dr. Sydney R. Lillard for an evaluation on January 12, 2022. Dr. Lillard provided the following prognosis:

> any attempt at surgical repair, with pre-existing suboptimal general health – diabetes, obesity, immobility, lymphedema – is likely futile. I would expect this to easily revert to another large abdominal wound, recurrent fistula, and hernia with any complication. As such I believe this is best tackled at a tertiary referral center (University of Colorado, University of Washington), with optimal resources of complex abdominal wall reconstruction, plastic surgery, and established long-term wound care facilities to manage an expected protracted hospitalization, and at a time when he has all outpatient resources available for healing and managing any expected complications. This would best be accomplished *when he is no longer incarcerated*.

(Doc. 52-3 at 83 (emphasis added).)

About a month later, Sliwinksi was seen by Dr. John Means, a board-certified abdominal surgeon. (Doc. 52 at 11.) Dr. Means concluded that "based on [Sliwinski's] abdominal wall anatomy, he does not have good surgical options for definitive reconstruction to warrant [removal of his abdominal mesh.] I do not feel this nonhealing wound puts him at significant risk for complications or sepsis and I have recommended ongoing local wound care given the lack of definitive reconstructive options." (Doc. 53-3 at 90–91.) Dr. Galt, Sliwinksi's regular wound care physician, agreed with Dr. Means' conclusion. (Doc. 52-3 at 99.)

Dr. Rees arranged for another consult, this time a telehealth evaluation

on May 3, 2022, with Dr. Robert Yates, a University of Washington abdominal surgeon. (Doc. 52-3 at 8–9.) Dr. Yates provided the following conclusion:

> [c]onsidering the patient's multiple health risks including diabetes, obesity, lower extremity lymphedema, [chronic kidney disease], and recent cardiovascular issues, I do not believe that he will benefit from a surgical repair of his wound at this time. Once the patient is optimized from these multiple standpoints, he should return to the clinic [for] re-evaluation.

(Doc. 52-3 at 104.)

Sliwinski disagrees with these opinions. (Doc. 65 at 3–4.) He believes he should have the surgery, and he believes that Defendants are violating his rights by not pursuing another opinion at a tertiary care hospital, claiming Defendants "stopped looking after two opinions from two sources." (Doc. 65-3 at 6.) Sliwinski's response includes several particular instances when he asserts he did not receive exactly what his doctors ordered. (Doc. 65-3 at 2–4.) The question presented here is not what Sliwinski would do if he were not incarcerated, or what medical treatment he would receive. The question is whether the approach of these Defendants, in light of the medical information and the resources they have, violates Sliwinksi's Eighth Amendment rights. "[U]nnecessary and wanton infliction of pain" is the sine qua non of an Eighth Amendment violation. *Edmo v. Corizon, Inc.*, 949 F.3d 489, 494 (9th Cir. 2020) (citing *Estelle*, 429 U.S. at 104.)

Sliwinski is receiving fairly constant care, prompt emergency treatment when required, and consultations with experts to determine the best course of treatment for his illnesses. The Court concludes Sliwinski has not suffered the "unnecessary and wanton infliction of pain" due to Defendants' care of him. Sliwinksi has not raised any disputed material facts that would warrant trial. Defendants are entitled to summary judgment.

Based on the foregoing, the Court enters the following:

ORDER

1. Defendants' Motion for Summary Judgment (Doc. 50) is GRANTED.

2. The Clerk of Court is directed to enter judgment and close this matter, pursuant to Fed. R. Civ. P. 58.

3. The Clerk of Court is directed to have the docket reflect that the Court certifies pursuant to Rule 24(a)(3)(A) of the Federal Rules of Appellate Procedure that any appeal of this decision would not be taken in good faith.

DATED this 18th day of January, 2023.

Brian Morris, Chief District Judge
United States District Court